INDEX

669320—62——1

CITATIONS

Cases—Continued

In the Supreme Court of the United States

October Term, 1962

No. 54

The White Motor Company, appellant

v.

United States of America

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 49–93) is reported at 194 F. Supp. 562.

JURISDICTION

This suit was instituted under Section 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 4. The judgment of the district court was entered on September 5, 1961 (R. 107). The notice of appeal was filed by the White Motor Company on October 26, 1961 (R. 112), and this Court noted probable jurisdiction on April 23, 1962 (R. 115; 369 U.S. 858). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15

U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 3 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1, 3, 4), commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> * * * * *
>
> SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade, or commerce in * * * the District of Columbia, or in restraint of trade or commerce * * * between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

QUESTIONS PRESENTED

The basic question is whether agreements by which a manufacturer limits the territories in which, and the customers to whom, its distributors and dealers may resell its products, are illegal *per se* under Section 1 of the Sherman Act. More particularly, the question is the *per se* illegality of the White Motor Company distribution system which, by written contracts:

1. Restricted each distributor and dealer to customers located in a specified geographic area;

2. Allocated certain named customers to a specified dealer or distributor;

3. Restricted the persons to whom White distributors and dealers might sell new trucks for resale;

4. Reserved certain classes of customers, including all State and federal governments, to White.

STATEMENT

On March 28, 1960, the United States filed an amended complaint (R. 1-7) in the District Court for the Northern District of Ohio charging appellant, The White Motor Company ("White"), with violating Sections 1 and 3 of the Sherman Act by restricting the geographic areas within which its distributors and dealers were permitted to sell White trucks and parts; by restricting the persons to whom distributors and dealers were permitted to sell trucks for resale; by prohibiting distributors and dealers from selling White trucks to any federal or state government or subdivision thereof; by fixing the resale prices for trucks and parts sold by distributors to dealers for resale; and by fixing the resale price on parts sold by distrib-

utors and dealers to certain designated customers—governmental subdivisions, national accounts and fleet accounts (R. 4, 5). On April 21, 1961, the district court granted the United States summary judgment on each of these grounds. The case is now before this Court on direct review of that judgment of the district court.

WHITE'S SYSTEM FOR DISTRIBUTION OF ITS TRUCKS

White is a leading manufacturer of medium and heavy duty trucks (R. 4), with total annual sales of over 160 million dollars in 1955, 1956, and 1957 (R. 93). Its system for distribution of its trucks is as follows:

White sells trucks and parts directly to over 200 so-called "distributors" (R. 503); [1] to over 10 dealers (R. 503); and to various large users of its trucks.[2] Both these direct dealers and the distributors sell new trucks and parts to users (R. 3). In addition, some distributors resell new trucks and parts to over 80 dealers (R. 503) whom the distributors appoint with White's consent (R. 2). All of the dealers sell new trucks and parts only to users. Thus, White sells to distributors, dealers, and users; the distributors sell to dealers and users; the dealers sell only to users.

---

[1] A significant function of White's distributors is the sale of trucks to consumers. A substantial number of distributors apparently do not sell to dealers for resale (R. 61).

[2] In 1957, White itself sold $20,344,000 or approximately 1/6 of its total output directly to "national accounts" and state and federal governments and their agencies and subdivisions. Appellant also sold $42,392,000 or approximately 1/3 of its total output to "fleet accounts."

Although the distributors and dealers are not White's agents but are independent purchasers of White's trucks for purposes of resale (R. 429, 465, 484), White thoroughly regulates by contract most aspects of the distribution system. It is a party not only to its contracts with distributors and direct dealers but also to the contracts consummated between distributors and their dealers, which are executed on forms supplied by White and are subject to White's approval.

White's contracts with its distributors reserve for itself certain very large customers; assign each distributor a defined territory and require the distributor to sell only to customers having a place of business or purchasing headquarters within the distributor's territory; forbid the distributor to sell to any customer for resale by that customer unless the right to do so is granted by White in writing; and set the prices for the trucks sold to dealers and for the parts sold to "national," "fleet," and governmental accounts (R. 423–431).

The contracts between White and its "direct" dealers are similar to the distributor contracts in that such dealers also are restricted as to territory; prohibited from selling trucks to certain classes of customers or for resale without the consent of White; and required to maintain prices set by White on sales of parts to "national," "fleet," and governmental accounts (R. 454–458, 462–466).

The contracts between distributors and dealers contain similar provisions imposing territorial limitations

and customer allocations as to truck sales, prohibiting sales for resale,[4] and requiring resale price maintenance on parts sold to "national," "fleet," and governmental accounts. An additional provision in these contracts binds the distributor to resell trucks to the dealer at prices set by White (R. 471–476).

In sum, as the district court found (R. 60–62), all distributors, direct dealers, and dealers agree and contract with White: (1) not to sell White trucks except to firms having a place of business within their assigned territory; (2) not to sell to particular named customers or to the federal or any State government or a subdivision thereof;[3] (3) not to sell to any person for resale without White's consent; and (4) not to depart from certain resale prices set by White.

THE DECISION OF THE DISTRICT COURT

On April 18, 1960, the United States filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that White's system of agreements was illegal *per se* under the Sherman Act, entitling the United States to judgment as a matter of law. The motion was granted on April 21, 1961.

The gist of the opinion rendered by the district court (R. 49–93) is summarized in the following passage (R. 87–88):

> The Sherman Act does not sanction the suppression by a manufacturer of competition

[3] Sales to all federal and state governmental agencies totaled $1,587,000 in 1955, $1,312,000 in 1956, $15,097,000 in 1957 and $19,883,000 for the first seven months of 1958 (R. 93).

among its purchasers or subpurchasers, *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 452 (1940); nor does it permit limitation on sales to certain customers or classes of customers by vertical combination. *Dr. Miles* v. *Park*, 220 U.S. 373, 400 (1911); *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 723 (1944); especially when part of a scheme to fix or maintain resale prices, *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44, 45 (1960). White can fare no better in a system of identical contracts with its distributors and dealers allocating territories and customers than could the distributors and dealers themselves "if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other." *Dr. Miles* v. *Park*, 220 U.S. 373, 408 (1911).

Accordingly, the district court issued its final judgment on September 5, 1961, declaring invalid, and enjoining the use of, those provisions in the franchise contracts (R. 109):

> (A) purporting to impose limitations or restrictions on the territories within which, or persons or classes of persons to whom distributors and dealers may sell trucks, and
>
> (B) purporting to obligate distributors and dealers to sell trucks and parts at prices or discounts established by the defendant.

White's notice of appeal challenged only the district court's ruling that the territorial divisions and the customer allocations are unlawful. White did not

appeal from the court's ruling that the provisions fixing resale prices were unlawful.[4]

SUMMARY OF ARGUMENT

I

Appellant's agreements eliminating competition among its distributors and dealers by allocating exclusive territories to each are illegal *per se*. Agreements that competitors shall not compete have always been held illegal without consideration of their actual effects. They cannot be justified by offering to prove that, in the particular instance, competition will be bad for the industry or the public, or even self-defeating. Under these rules agreements among competitors dividing customers or markets are illegal *per se* and White's distributors or dealers could not justify a division of markets identical to that instituted by White by attempting to show that the collateral effects of eliminating their competition would be a beneficial increase in competition with other makes of trucks. These principles have been firmly established by the decisions of this Court.

The agreements between White and its dealers and distributors dividing the customers and markets in which the latter compete are likewise illegal *per se* as explicit agreements that potential competitors shall not compete. The elimination of competition is total

[4] The notice of appeal also presented the question whether "the judgment entered by the District Court is improper in that it does not sufficiently identify the provisions of said contracts which are adjudged to be illegal" (R. 114). Since this question is not discussed in appellant's brief on the merits, we assume it is no longer in issue.

and identical to the effects of an admittedly illegal agreement among the dealers themselves. White has no justification which could not also have been made for an agreement among its purchasers themselves, but neither vertical nor horizontal divisions of the market can be justified, and for the same reason: Congress has authoritatively determined that the evils of agreements whose function is to restrict competition among competitors outweigh any benefits from the restriction. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373, 408. Each of the justifications offered by appellant for dividing the market among its distributors and dealers is, at bottom, an argument that competition is undesirable and is thus no more than an invitation to this Court to reconsider the legislative premises of the Sherman Act. In addition, each of the legitimate business ends of a manufacturer's division of markets can be, and are generally, obtained without restraining competition among its purchasers in the sale of its product.

A full inquiry into the long-term effects of territorial restrictions such as White's would be incredibly prolonged and complicated and would, in all probability, be fruitless. Moreover, even if there were a relevant theoretical distinction between market divisions voluntarily undertaken by manufacturers and those instigated by dealers, any such distinction would not be administerable in practice because of the interrelated motivations of the dealers and the manufacturer which go into any decision by a manufacturer to divide its purchasers' markets.

Finally, this Court has already determined that there is to be no distinction between vertical and horizontal agreements to restrain competition. The fact that a manufacturer has good business reasons for an agreement to eliminate competition among its dealers was held to be irrelevant in considering the validity of the agreement in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373. In *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, this Court held invalid a manufacturer's prohibition of sales for resale by its customers without its approval in terms and for reasons that would include not only White's identical requirements but also its similar territorial restrictions. Even at common law a manufacturer's restraint on his customer's free use and sale of a product purchased in the ordinary course of business would be a prohibited restraint of trade.

II

Appellant's contracts eliminating competition in the sale of its trucks by forbidding distributors to sell to certain classes of customers are also illegal *per se*. Its contracts reserving certain customers to itself are, under *United States* v. *McKesson & Robbins*, 351 U.S. 305, simply contracts among potential competitors not to compete for certain customers. Such contracts have long been held illegal *per se*. Its contracts prohibiting sales to any customer for resale without its approval are illegal under *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, which held indistinguishable agreements to be in violation of the Sherman Act.

ARGUMENT

I. APPELLANT'S AGREEMENTS ELIMINATING COMPETITION AMONG ITS DISTRIBUTORS, AND ALSO AMONG ITS DEALERS, BY ALLOCATING AN EXCLUSIVE SALES TERRITORY TO EACH, ARE PER SE UNLAWFUL CONTRACTS IN RESTRAINT OF TRADE

Section 1 of the Sherman Act condemns all contracts and combinations which restrain competition without other significant business justification than the consequences supposed to flow from the restriction. No further inquiry into the reasonableness of the restraint is required or permitted. "* * * there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry ~~as to~~ the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 210; division of markets, *United States* v. *Addyston Pipe & Steel Co.*, 85

F. 271, aff'd, 175 U.S. 211; group boycotts, *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457; and tying arrangements, *International Salt Co. v. United States*, 332 U.S. 392." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5.

In stating that an agreement for a "division of markets" was unlawful *per se*, the Court, in *Northern Pacific*, drew no distinction between vertical and horizontal agreements. The Court has long held that vertical and horizontal price fixing agreements are equally unlawful *per se*. We submit that agreements between a manufacturer and his distributors providing for a division of markets among the distributors are as unlawful *per se* as a division among the distributors themselves. There is no reason for engrafting an exception upon the general rule outlawing this category of restraints of trade.

A. AGREEMENTS AMONG COMPETITORS WHICH ASSIGN TO EACH AN EXCLUSIVE GEOGRAPHICAL PORTION OF THE MARKET ARE UNLAWFUL PER SE

Where an agreement provides explicitly that potential competitors shall not compete and any benefit to the parties from the agreement is meant to follow as the consequence of such a restriction on the free play of competition, the soundness of applying a *per se* rule of illegality is dictated by three considerations. *First*, there is no need to consider the actual effects of the agreement upon competitive trade because: (a) it can be assumed that the parties to the agreement had basis for their expectation of benefit from the intended restriction of competition and (b) even if the parties

were wrong in believing that their agreement would affect competitive conditions in the market, there is no harm in enjoining the enforcement of an agreement which could have been of benefit to them only if competition had been affected. *Second*, there can be no valid justification for an agreement the benefits of which are thought to depend upon a restriction of competition among parties who would otherwise compete. The only possible justification—that competition is, in the particular situation, harmful to the public or self-destructive—runs counter to the enacted philosophy of the Sherman Act. *Third*, even if the statute left the question open for judicial inquiry, an investigation into the desirability or undesirability of competition—or of one form of competition as opposed to another—would be incredibly complex and prolonged, and often fruitless.

For these three reasons the Court has held unlawful—without consideration of effects or asserted justification—agreements fixing prices,[5] fixing other terms of doing business,[6] restricting volume of sales or production,[7] boycotting a customer or supplier,[8] and dividing markets.[9] In none of these instances is a further showing of an adverse effect on the market necessary. Moreover, as to justification, these cases stand for the

---

[5] *United States* v. *Trenton Potteries Co.*, 273 U.S. 392.

[6] See, *e.g.*, *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30; *United States* v. *First National Pictures*, 282 U.S. 44.

[7] Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150.

[8] *Fashion Originators' Guild of America* v. *Federal Trade Commission*, 312 U.S. 457.

[9] *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593.

669320—62——3

proposition that contracts or combinations the immediate function of which is to restrict competition cannot be justified by offering to prove that, in the particular instance, competition will be bad for the industry or the general public or that, in the end, it will be self-defeating.

Thus the Court has noted with respect to price-fixing agreements that:

> * * * Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.[10]

and the Court has held that competitors cannot agree together to fix *maximum* resale prices for their distributors whether or not such an agreement promises to benefit the ultimate consumer:

> * * * For such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.[11]

Nor can the desirability of individual, competitive decision-making be challenged where what is involved is a refusal to deal. Competitors cannot join together to stop dealing with a distributor who is violating the antitrust laws,[12] or refuse to sell to any re-

---

[10] *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226, n. 59.

[11] *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213.

[12] *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214.

tailer who deals in copies of their dresses or fabrics[13] although in each case it could be, and has been argued that the agreement was to the benefit of the public. As this Court stated in *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 613:

> The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. *Addyston Pipe Co. v. United States*, 175 U.S. 211, 241, 242.

The policy of the Sherman Act is that the most efficient use of economic resources and the most desirable distribution of economic power results from the separately made choices of buyers and sellers in a competitive marketplace. This statutory decision cannot be reversed by a contention that, in the particular case, competition will prove to be contrary to the public interest. "The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties, and it may be, of some good results." *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49.

---

[13] *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457.

2. The established law regarding a division of markets among competitors is, as we have noted, but one facet of these more general rules. This Court has consistently held for over sixty years that agreements among competitors to allocate markets are illegal *per se,* for the plain purpose of such agreements is to eliminate competition among potential competitors. *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593, 596–599; *United States* v. *National Lead Co.,* 63 F. Supp. 513 (S.D. N.Y.), affirmed, 332 U.S. 319; *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 497; *United States* v. *American Tobacco Co.,* 221 U.S. 106, 182; *Addyston Pipe & Steel Co.* v. *United States,* 175 U.S. 211, 241.

Offered justifications for such agreements must fail because they necessarily involve a contention, which has been rejected by the Sherman Act, that competition should be restricted as harmful in the particular context. Thus, for example, in *United States* v. *National Lead, supra,* the contention that substantial public benefit had resulted from a division of markets was rejected by Judge Rifkind in these terms (63 F. Supp. at 525):

> * * * during the regime of the combination, the art has rapidly advanced, production has increased enormously and prices have sharply declined. The evidence does show as much; but it does not follow that the public interest has not been abused. Indeed, the major premise of the Sherman Act is that the suppression of competition in international trade is in and of itself a public injury; or at any rate, that

> such suppression is a greater price than we want to pay for the benefits it sometimes secures. * * * The economic theory underlying the Sherman Act is that, in the long run, competition is a more effective prod to production and a more trustworthy regulator of prices than even an enlightened combination.

It is clear under these cases that a division of markets by agreement among the distributors and dealers of White trucks could not be justified by the claim that the customers in each allocated territory would be better served by the territorially restricted and concentrated attention of one distributor than by the diffused attention and competition of a number of distributors. It is even plainer that such a horizontal division of markets by White distributors and dealers could not be justified by a claim that, without the security against intra-brand competition granted by the agreement, they would not be willing or financially able to continue to devote their time to the sale of White trucks in effective competition with the trucks of General Motors, Ford, and International Harvester. As we now show, a similar division of markets among White's distributors and dealers which is accomplished by agreements between them and White, rather than by agreement among themselves, is equally illegal *per se*.

B. AGREEMENTS BETWEEN A MANUFACTURER AND DEALERS IN ITS PRODUCTS WHICH ASSIGN EACH PURCHASER AN EXCLUSIVE GEOGRAPHICAL PORTION OF THE MARKET ARE ALSO ILLEGAL PER SE

The three grounds discussed in *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5, for hold-

ing an agreement illegal *per se* are fully applicable to an agreement between a manufacturer and its independent distributors allocating a competition-free zone to each distributor: (1) the anticompetitive consequences of such agreements are identical with the effects of horizontal divisions of the market; (2) the agreements have no redeeming virtue to justify their anticompetitive effects; and (3) any attempt to investigate the reasonableness of each particular agreement would be hopelessly involved and almost certainly fruitless.

1. *Territorial restrictions effected by agreements between a manufacturer and its dealers seriously restrain competition*

White does not, and cannot, contend that its system of distribution dividing the territorial market through agreements with each distributor or dealer has any less tendency to restrain competition among the distributors and dealers than a series of horizontal agreements among the distributors and dealers themselves. Regardless of whether they assume a horizontal or a vertical form, the intended and actual effect of agreements dividing a market territorially is a far more complete destruction of competition than is the intent or effect of any of the other agreements which are unlawful *per se*. Unlike an agreement to set the price or some other term of a transaction for several competitors, an agreement to divide markets does not leave open the many forms of competition which are not in terms of price or of some other agreed-upon term. *All* competition is eliminated between the beneficiaries of an agreement

dividing markets. Each is freed by contract from any limitations on his economic power which depend upon the availability of the others as alternative sources of supply for the goods or services furnished. Within his territory each is assigned the economic power of all the agreeing competitors to set prices, to determine other terms of dealing, and to refuse to deal with particular customers. Each competitor's territory is made an economic island isolated from all competition from the other parties to the division of markets.

A customer wishing to buy a White truck is forced, by the terms of the agreements in this case, to deal with only one seller. The agreement is strict in this regard. Not only will the prospective buyer be denied the opportunity to deal with a neighboring distributor that might otherwise come to him and seek his custom but even if the prospective purchaser is willing to travel to a neighboring territory, his offer of purchase must be rejected unless he has "a place of business and/or purchasing headquarters in said territory" (R. 425). It is, of course, true that, to whatever extent a prospective customer considers other makes of trucks as desirable as White trucks, he will have available the competition of alternative manufacturers; but for a number of sound reasons the existence of interbrand competition has never been found a justification for an explicit agreement to eliminate competition, whether it takes the form of a division of territories, or price fixing, or any of the other *per se* violations discussed above. See, *e.g.*, *United States* v. *McKesson & Robbins*, 351 U.S. 305.

The very function of the *per se* prohibitions of anti-competitive agreements is to prohibit restrictions on competition without undertaking a prolonged and often inconclusive analysis of their actual effects in the market.

2. *There is no business justification for the territorial restrictions effected by the agreement between White and its distributors and dealers*

We have noted above[14] that White's dealers would not be heard to justify an agreement to divide markets, because the very function of the agreement is to eliminate competition protected by the Sherman Act. There is no reason why the desirability of competition among those selling White trucks should be more of an open question for White itself.

The two types of agreement have identical effects upon competition and every justification White can assert could, but for the *per se* rule, be asserted by its dealers as well. White, no less than its dealers, is frankly seeking the benefits of an agreement that potential competitors shall not compete. The only asserted basis for a distinction between White and its dealers is said to be that the elimination of competition by vertical agreements may accomplish legitimate business ends for White. But even this basis fails, for White's desire to obtain an improved competitive position *vis-a-vis* other automobile manufacturers by eliminating competition among its dealers is no more legitimate than the desire of White dealers to improve their competitive position *vis-a-vis* General Motors'

[14] *Supra*, pp. 17-18.

dealers through an agreement dividing the market for White trucks among themselves. The reason the attempted justifications fail is the same in each case: the Congress has authoritatively decided that the evils of agreements whose function is to restrict competition among parties who would otherwise compete outweigh any benefits resulting from the restriction. It follows that the present case is governed by *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373, 408, where this Court held that a manufacturer:

> * * * can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system.

White cannot justify imposing a price-fixing agreement upon its dealers. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373. It could not justify requiring its dealers to boycott a class of their competitors. *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707. By analogy, we submit, it cannot justify imposing a division of markets upon its dealers that they could not lawfully establish among themselves.

Each of the justifications offered by White for dividing the market among its distributors and deal-

ers is, at bottom, an argument for the elimination of competition and is thus no more than an invitation to this Court to reconsider the legislative premises of the Sherman Act.

First, White says that it can avoid the duplication of effort among its distributors and dealers and improve its own position in the market by allocating exclusive sales territories to each so that "dealers' competitive energies will not be directed against each other—a conflict from which the manufacturer derives no ultimate benefit—but rather against the dealers of competing manufacturers" (Brief for Appellant, p. 11). The function of the agreement, thus described, is to restrain competition—the very thing the Sherman Act forbids—and thus the argument stands as its own condemnation. The policy of the Sherman Act does not prefer one form of competition to another. The Act is based upon the philosophy that the most efficient distribution of trucks, as of any other product, will result from intra-brand competition between the sellers of one brand (in this case, White trucks) in addition to competition between those sellers and the dealers in other brands or models. One of the costs of competition is that there is no division of the labor of selling. Time and effort are always spent "unprofitably" by the dealer who tries but fails to sell his product in a competitive market, but the Sherman Act is a conclusive legislative determination that this "waste" is more than offset by the advantages of unrestricted competition. The statutory determination cannot be set aside because the manufacturer of a particular product offers

to prove that it can gain little or nothing from competition among the dealers in its product and may gain sales by eliminating what it regards as the wastes of competition.

Next appellant argues that it "has built up substantial good will in its organization of independent dealers and distributors" because its contracts assure them that "they will have the security of getting the easier, large-volume White customers in their areas" and, after spending valuable time "softening [a customer] up," will not lose the sale "to another White dealer who jumps territorial boundaries at a strategic moment and snatches away the pre-sold customer" (Appellant's Brief, pp. 12-13). It is hardly necessary to point out that this is nothing more than an argument that appellant has built up good will among its dealers by promising them protection against competition. Manifestly, the Sherman Act does not permit a manufacturer to justify giving dealers a form of immunity from the antitrust laws on the ground that that the dealers like it, even though offering such a bonus is a good way to obtain dealers who can increase White's own sales in the market for trucks. The benefits of competition-free selling are not appellant's to confer. The benefits of competition are guaranteed to the purchasing public by Section 1 of the Sherman Act.

Finally, appellant urges that individual dealers need the "cream" of higher profits that comes from selling "the easier large-volume White customers" without competition, in order to have the financial strength to sell "less lucrative accounts" and build up

strong service departments (Appellant's Brief, pp. 12–13). Price competition among the sellers of the same product might, perhaps, tend to limit the possibilities of competition with other brands in terms of repair services, advertising and displays, or other sales services. From appellant's standpoint it is not unreasonable to believe that the added financial return lost by price competition among its dealers seeking a customer who would have purchased a White truck at a higher price could have been better spent by some one dealer on advertising or repair facilities. But the Sherman Act does not recognize a class of customers who can be denied the benefits of competition in order to yield "cream" to dealers with which they may seek to increase their total sales. The policy of the Sherman Act is that the proportion of time, money and effort to be devoted to inter-brand rather than intra-brand competition, and to each of the inducements offered by sellers to buyers, is to be determined by the free decisions of individual sellers, not by agreements between a manufacturer and its purchasers or by agreements among the sellers themselves. It is not for appellant to eliminate one significant aspect of competition in the sale of trucks, even though it can show that its profits would be greater if it could substitute inter-brand for intra-brand competition.

It has also been suggested that territorial limitations vertically imposed upon dealers by a manufacturer have one putative justification that distinguishes them from horizontal agreements among dealers dividing the territorial market—that the dealer who is confined to a defined territory "will compete

more aggressively in that territory in order to achieve a profitable level of sales, and thus produce lower rather than higher prices to the consumer." See Turner, *Agreement under the Sherman Act*, 75 Harv. L. Rev. 655, 699. One answer, pointed out above, is that the contracts, whether vertical or horizontal, seek to substitute agreed territorial restrictions of time and effort for the independent allocations which would be made by individual firms in response to the forces in a free market. Furthermore, the distinction, as we show below, is wholly impracticable whatever its academic merit. See pp. 32–34 below. And a manufacturer has ample ways of securing dealers who will devote to a particular area the time and effort the manufacturer desires without his restraining them from also seeking business elsewhere. Professor Turner concludes that "territorial limitations—in the light of their obvious susceptibility to anti-competitive misuse—are more restrictive than necessary to achieve the legitimate goal, in the light of such restrictive alternatives as a clause assigning each dealer a territory of primary responsibility which he agrees to use his best efforts to develop" (*Ibid*).

Thus, White has a wide and effective range of tools for developing a network of distributors and dealers who are financially sound and capable of vigorously promoting the sale of its trucks in every market. It may select whatever distributors and dealers it wishes and offer them, in broad measure, such advantageous terms or other assistance as it desires. As suggested by Professor Turner, it may require each to stipulate that it will use its best efforts to develop

a particular territory, and, in many contexts, the undertaking might be made more precise by requiring the expenditure of specified amounts of time and money in sales promotion within that area. The district court has held in this case that appellant may even offer its dealers exclusive franchises—that is to say, it may agree not to sell its trucks to another dealer with a place of business in the same territory. The district court also suggested that appellant may, at least absent a factual showing of significant anti-competitive effects, insist upon contractual provisions with its distributors and dealers giving it the right to regulate the location and appearance of showrooms, the maintenance of adequate repair and service facilities, the employment of courteous, skilled and trained sales personnel, the compliance with local laws and regulations, the maintenance of good credit ratings or the assumption of primary responsibility for sales coverage for specified areas and classes of customers. White might reserve the right to enforce its requirements by cancellation of a dealer's franchise or some lesser sanction. There is no justification, therefore, for an agreement that seeks to accomplish these ends by destroying the very competition that the Sherman Act is intended to preserve.

The methods open to White to control the distribution of its product have been found adequate by American industry in general, and the automobile industry in particular. In 1955, H.R. 6544 (84th Cong., 1st Sess.) was introduced as an amendment to Section 5(a) of the Federal Trade Commission Act. It provided in pertinent part:

> (7) Nothing contained in this Act or any other Act shall render unlawful any contracts

> or agreements in which a manufacturer requires his distributor to agree that he will sell only within a designated geographical area and will refrain from selling outside said area * * *.

The background of the bill, as explained during the hearings by Judge Barnes, the Assistant Attorney General in Charge of the Antitrust Division, was this:[15]

> In 1949, during the course of an investigation relating to the distribution of automobiles, the Department of Justice expressed the view that territorial security provisions of this type raised serious questions under the antitrust laws. Thereafter, the leading automobile manufacturers removed from their agreements all provisions for territorial security, and this was a voluntary removal, including those in the form of service commissions and liquidated damages.

During the hearings, representatives of the automobile industry expressed their opposition to the bill with significant unanimity.

A representative of Ford Motor Co., Mr. Crusoe, Executive Vice President, Car and Truck Divisions, stated:

> In view of our unsatisfactory experience with territorial security provisions in the past and the apparent difference of opinion on this subject among our dealers, we do not believe that restrictive provisions in sales agreements au-

---

[15] Hearing Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on Automobile Marketing Legislation, 84th Cong., 1st Sess., p. 362 (1956) (hereinafter cited "Hearing").

> thorized by [H.R. 6544] would be welcomed by our dealer body as a whole, or would be in the best interests of our company or the public. [Hearing, p. 248.][16]

Similar opposition to territorial allocation was expressed by representatives of General Motors (Hearing, p. 160), American Motors ("American Motors is not in favor of any legislation, permissive or otherwise, that restricts the right of the customer to choose any dealers from whom he desires to purchase" (Hearing, p. 285)), and Chrysler Corporation (Hearing, p. 323).

The retreat from territorial restrictions has not been limited to the automobile industry. Large and small industrial concerns of every sort have abandoned similar restrictive systems without litigation and have entered into appropriate consent decrees.[17] There is,

---

[16] Similar statements were made by Henry Ford II, who characterized territorial allocation as "unworkable" and "contrary to the public interest". Hearings Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on Automobile Marketing Practices, 84th Cong., 2d Sess., p. 978.

[17] See *e.g.*, *United States* v. *Scott Aviation Corp.*, 1961 CCH Trade Cases ¶ 70,148 (W.D. N.Y.); *United States* v. *Bostitch, Inc.*, 1958 CCH Trade Cases ¶ 69,207 (D. R.I.); *United States* v. *Rudolph Wurlitzer Co.*, 1958 CCH Trade Cases ¶ 69,011 (W.D. N.Y.); *United States* v. *Philco Corp.*, 1956 CCH Trade Cases ¶ 68,409 (E.D. Pa.); *United States* v. *Libbey-Owens-Ford Glass Co.*, 1948–1949 CCH Trade Cases ¶ 62,323 (N.D. Ohio); *United States* v. *Arnold Schwinn & Co.*, 5 CCH Trade Reg. Rep. ¶ 70,445 (N.D. Ill.); *United States* v. *American Type Founders Co., Inc.*, 1958 CCH Trade Cases ¶ 69,065 (D. N.J.); *United States* v. *Necchi Sewing Machine Sales Corp.*, 1958 CCH Trade Cases ¶ 68,957 (S.D. N.Y.); *United States* v. *AMI, Inc.*, 1957 CCH Trade Cases ¶ 68,758 (W.D. Mich.); *United States* v. *J. P. Seeburg Corp.*, 1957 CCH Trade Cases ¶ 68,613 (N.D. Ill.).

in short, no reason to believe that a system of territorial restrictions is essential to efficient marketing of a manufacturer's product.

3. The attempt to investigate the reasonableness of White's territorial restrictions would be excessively prolonged and complex, and almost certainly fruitless

Although the grounds discussed above are the primary bases for the rule that condemns as illegal *per se* agreements that potential competitors shall not compete, it has the further advantage of bringing a measure of certainty into antitrust law. As the Court explained in the *Northern Pacific* case (356 U.S. at 5)—

> This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. * * *

This Court has refused every invitation to investigate the nebulous and long-range effects of agreements whose function is to prevent competition among competitors. Frequently it has been argued, with some plausibility, that a particular restriction upon competition would benefit the industry and even the competitive economy as a whole. Price competition, it has been argued, would ultimately destroy all competition, and enforcement of a *per se* rule would be

self-defeating.[18] Offers have been made to prove that the prices were "reasonable."[19] The participants in a trade boycott offered to prove that its "practices * * * were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer from the devastating evils flowing from the pirating of original designs and had in fact benefitted all four."[20] The investigation of such ultimate possibilities would be incredibly long and complicated. The answer, in all probability, would be too uncertain to offset the plain and immediate harm. The Court has therefore concluded that the Sherman Act is best effectuated by forbidding every agreement to eliminate competition, without attempting to predict whether the agreement would or would not ultimately benefit the public.

In the present case any attempt to trace and assess the ultimate economic effects of White's agreements restraining competition would be not only incredibly prolonged and complex but also almost certainly futile. Each of White's justifications involves a matter of almost irresolvable dispute. The elimination of competition among its distributors may, as White contends, result in their devoting greater effort and resources to competition with dealers in other makes of trucks; but it may also result only in higher profits for either the dealers or White without any increase in interbrand competition. Similarly, it is impossible to know what sales volume or prices would result

---

[18] *United States* v. *Joint Traffic Assn.*, 171 U.S. 505.

[19] *United States* v. *Trenton Potteries*, 273 U.S. 392.

[20] *Fashion Originators' Guild of America* v. *Federal Trade Commission*, 312 U.S. 457, 467.

from competitive selling. A dealer who is free to enjoy the profits from "cream" customers because he possesses a territorial monopoly may or may not use the added profits to finance the costs of "scouring" for hard-to-get customers or of competing with General Motors; the increase in easy profits may as easily reduce as increase the dealer's incentive to make additional, less profitable sales. Again, competition among White distributors might well result not in poorer repair facilities but in efforts to secure more sales by improving the repair services to which White attaches such importance.

Even if these matters could be fruitfully resolved by a trial, their resolution would only lead to further inquiries, with even wider-ranging implications. What is the importance of competition in services or increased selling effort as opposed to price competition? What is the importance of *interbrand* as opposed to *intrabrand* competition? Are White's restrictions excessive in the amount of territory allocated to any or all dealers, in the duration of the allocation, or in any other way? Will White's restrictions remain reasonable if its share of the market increases? Should White's competitors be free to respond to White's plan with similar territorial restrictions, and will this result in oligopolistic pricing at the dealer level? These are only a few of the issues relevant to a trial of the "reasonableness" of any particular set of territorial restrictions. Nor could one be content with a single investigation. Business conditions change. The effect of restricting competition among dealers today may

be different tomorrow. The Sherman Act does not put the government to the burden of such prolonged inquiries or constant investigation of the shifting effects of agreements that potential competitors shall not compete. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397–398.

The same objection applies to the effort to distinguish between (a) territorial restrictions imposed by a manufacturer upon distributors allegedly for the purpose of increasing his own sales and (b) allocations of territory made for their benefit by horizontal agreements among the dealers. Certainly the form alone cannot be decisive. If the dealers joined together to force the manufacturer to impose territorial restrictions, the resulting agreements would be illegal notwithstanding that they took the form of a series of agreements between the manufacturer and the dealers.[21] Even if a single dealer or distributor forced the manufacturer to institute a division of markets to eliminate competition with the other dealers, the agreement would surely be illegal despite its vertical form.[22] No workable distinction can be drawn in terms of whether the dealers or the manufacturer initiated the division of markets. Their motivations are inextricably intertwined: indeed one purpose of such agreements is said to be the indirect benefit to a manufacturer of llowing him to offer his distributors the immediate benefits of an agreement

---

[21] See *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293.

[22] See, *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 228–230.

they could not accomplish by themselves. No purpose of the antitrust laws would be served by making legality turn on such questions as whether the manufacturer, formally or informally, polled his dealers to discover their wishes before imposing the agreement or whether the manufacturer or its dealers first suggested the territorial restrictions. A rule that condemned vertical agreements only when forced upon the manufacturer by an illegal combination of dealers, such as a group boycott, would permit a multitude of formally vertical contracts that divided territory for the benefit of dealers. Finally, it is hardly necessary to add that a distinction between market-division agreements in terms of which party is the moving force would provide a constantly shifting standard; an agreement initiated by a manufacturer for his sole benefit might survive, after a period of time, only because of the wish of the distributors.

C. THE DECISIONS OF THIS COURT FORECLOSE ANY DISTINCTION BETWEEN HORIZONTAL AND VERTICAL DIVISION OF MARKETS

The district court correctly held that the present case is controlled by this Court's decision in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373, that the manufacturer of a proprietary medicine could not impose a uniform resale price on the distributors and retailers of its product. There, as here, it was established law that the distributors and dealers could not enter into an agreement among themselves identical to that imposed upon them by the manufacturer. The central issue concerned the validity of a claim that the legitimate business purposes of the manufacturer could justify the institution of

a system of restraints upon competitors that was designed to benefit the manufacturer through the medium of eliminating competition among its dealers and distributors.

Dr. Miles Medical Company attempted to justify its agreements by alleging (220 U.S. at 374–375) that its sales depended upon the good will of retail druggists and upon the reputation of its product; that cut-rate sales of its product destroyed the good will of its retail outlets who could not realize sufficient profits and destroyed the reputation of its product for superior quality; and that the inadequate return of its outlets was insufficient to enable them to market its product properly.

In an opinion by Justice Hughes, the Court rejected these defenses in terms very similar to those urged above. There is no reason, the Court held, why the manufacturer should be free to justify agreements intended to destroy competition among dealers by showing the indirect benefits to himself, when the dealers could not justify the same agreements by showing benefits to themselves (220 U.S. at 407–409):

> The bill asserts the importance of a standard retail price and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them and not to the complainant. It is through the inability of the favored dealers to realize these profits, on account of the described competition, that the complainant

works out its alleged injury. If there be an advantage to a manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system.

But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. * * *

The same reasoning is equally controlling here. Here, as there, "The [manufacturer] having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic" (220 U.S. at 409).

Over thirty years after the *Dr. Miles* case, this Court reaffirmed the principle in *United States v. Bausch & Lomb Co.*, 321 U.S. 707, a case which closely parallels the present case. *Bausch & Lomb* involved the validity, under Sections 1 and 3 of the

Sherman Act, of the distribution system of Soft-Lite eyeglass lenses. Soft-Lite sold its lenses to wholesalers who, in turn, sold them to retailers. "Soft-Lite's wholesalers were allowed to resell only to retailers who held licenses from Soft-Lite" (321 U.S. at 714). "Soft-Lite indicated to the wholesalers the prices to be received by them from retailers by means of published price lists," and each retailer was "required to maintain prevailing local price schedules" (321 U.S. at 715).

The district court held that Soft-Lite had contracted and conspired with wholesalers and retailers to violate the Sherman Act (321 U.S. at 717):

> * * * (b) by entering into so-called "license" agreements with optical retailers which provide that said retailers will sell such lenses only to the public; (c) by entering into agreements with wholesale customers which provide that the said wholesalers will sell Soft-Lite lenses and blanks only to retailers who are designated as "licensees" by the defendant Soft-Lite Lens Company, Inc. * * *

In affirming the holding that such agreements were illegal, this Court stated (321 U.S. at 721, emphasis added):

> Soft-Lite is the distributor of an unpatented article. It sells to its wholesalers at prices satisfactory to itself. Beyond that point it may not project its power over the prices of its wholesale customers by agreement. A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or *the persons to whom its purchasers may resell*, except as the seller moves

> along the route which is marked by the Miller-Tydings Act. * * * Even the additional protection of a copyright * * *, or of a patent * * *, adds nothing to a distributor's power to control prices of resale by a purchaser. *The same thing is true as to restriction of customers.* * * *

The Court further pointed out (321 U.S. at 723, emphasis added):

> So far as the wholesalers are concerned, Soft-Lite and its officers conspired and combined among themselves and with at least some of the wholesalers to restrain commerce by designating selected wholesalers as sub-distributors of Soft-Lite products, by fixing resale prices and *by limiting the customers of the wholesalers* to those recommended by the wholesalers and approved by Soft-Lite—all in violation of the Sherman Act. * * *

United States v. Bausch & Lomb plainly governs the present case. In the *Bausch & Lomb* case the distributor was required to limit his customers to persons approved by Bausch & Lomb whereas appellant defines the limitation by both a customer and a geographical restriction; but the distinction is irrelevant because the basic vice of both schemes is the same: each involves an unlawful attempt by a manufacturer to limit competition in the distribution of its product after it has sold it to others. *Bausch & Lomb* makes it clear that such an attempt is illegal whether its purpose is to "limit * * * the price at which or the persons to whom its purchaser may resell * * *." (321 U.S. at 721). It is immaterial whether the primary purpose

of controlling the customers to whom the products were resold is, as in *Bausch & Lomb*, to effectuate a price-fixing scheme or, as appears in the present case, to eliminate competition for customers.

White's territorial and customer allocations are also unlawful, under traditional concepts, as an attempt by a manufacturer to project its control over goods into the hands of the purchaser. The attempted retention of control after sale runs counter to a policy which has its roots in the common law, and to which the Sherman Act gives full expression.

The common law recognized in only one very limited area a right of the seller of property to restrain its subsequent use. Thus, in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (C.A. 6, 1898), Judge Taft included in his now-classic list of the five restraints of trade valid at common law[23] agreements "by the buyer of property not to use the same in competition with the business retained by the seller." But Judge Taft was not speaking of repetitive sales

---

[23] "[C]ovenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. * * *" (*United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 281 (C.A. 6, 1898)).

of goods manufactured on order or sold from inventory in the regular course of business. That is apparent from Judge Taft's prior and more complete discussion of each of the permissible restraints, in the course of which he showed that restraints on the use of property sold, like several other valid restraints, were permitted as an incentive to the sale of the *assets necessary to engage in the seller's business.* Without such incentive a businessman could not be expected to sell property which could be used in competition with his business. Speaking of covenants by a buyer of property not to compete with the seller, Judge Taft explained (85 Fed. at 280-281):

> Again, when one in business sold property with which the buyer might set up a rival business, it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict. This was not reducing competition, but was only securing the seller against an increase of competition of his own creating. Such an exception was necessary to promote the free purchase and sale of property. * * *

Plainly, this exception to the common law prohibition of restraints of trade deals with the transfer of capital assets, not inventory. It was never intended to apply to routine sales of a manufacturer's stock in trade, a situation in which no property is sold "with which the buyer might set up a rival business" and no exception is "necessary to promote the free purchase

and sale of property."[24] The exception has always been limited by this Court to cases like *Oregon Steam Navigation Co.* v. *Winsor,* 20 Wall. 64, where a steamship which could be used to set up a rival business was sold by a steamship company. Justice Bradley's understanding of the scope of the common law rule is indicated by his illustration of a comparable, valid restraint (20 Wall. at 67–68):

> * * * Suppose the case of two persons associated in business as partners, and engaged in a manufacture by which they supply the country with a certain article, but the process of manufacture is a secret; and they agree to separate, and one of the terms of their separation is, that one of the parties shall not sell the manufactured article in Massachusetts, where the other resides and carries on business; and that the latter shall not sell the article in New York, where his associate is to reside and carry on business. Can there be any doubt that such an agreement would be valid and binding? * * *

---

[24] The cases cited by Judge Taft at 85 Fed. 271, 282, as illustrative of the exception for covenants by purchasers of property, also demonstrate its inapplicability to the case at bar. Three of the cases, *American Strawboard Co.* v. *Haldeman Paper Co.*, 83 Fed. 619 (C.A. 6, 1897), *Hitchcock* v. *Anthony*, 83 Fed. 779 (C.A. 6, 1897) and *Hodge* v. *Sloan*, 107 N.Y. 244 (1887), involve the sale of single plots of real estate; the remaining two cases, *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64, and *Dunlop* v. *Gregory*, 10 N.Y. 241 (1851) involve the sale of steamboats with a restriction excluding the vendee from the area within which the vendor operated remaining vessels.

The critical distinction between covenants incidental to the sale of a business or similar capital assets and restraints upon the distribution or use of articles manufactured and sold in the regular course of business is exemplified by the contrast between the *Oregon Steam Navigation* case and the line of decisions stemming from *Adams* v. *Burke*, 17 Wall. 453, and *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373. In *Adams* v. *Burke*, *supra*, a patentee had assigned all rights of making, using, and vending the patented article within a ten-mile radius of Boston to the defendant's vendor. The defendant, having purchased the article within the ten-mile radius, used it outside that area. The plaintiff, assignee of the original patentee, alleged infringement by this use. Although the statute specifically authorized the patentee to control the manufacture and *use* of the patented article, the Court denied the patentee control of the use of the patented article after its initial sale. With express recognition that the public interest was involved, the Court held that "when the patentee * * * sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use." 17 Wall. 453, 456. *Keeler* v. *Standard Folding Bed Co.*, 157 U.S. 659, applied the same rule to *sales* outside a limited territory.

Since the Sherman Act codified the public interest in unrestricted distribution of goods which underpinned *Adams* v. *Burke*, attempts by a manufacturer

to impose restrictions on resale by its vendees have been struck down, regardless of the justification offered. Thus, resale price maintenance agreements covering proprietary medicines (*Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373), patented products (*Boston Store* v. *American Graphophone Co.*, 246 U.S. 8) and copyrighted articles (*Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339) were invalidated as outside the statutory monopoly. And attempts to control a licensee's choice of customers have met a similar fate (*Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436).

In the *Ethyl Gasoline* case, the Court held illegal a patent licensing system which prohibited the refiners of gasoline containing the patented fluid from selling to anyone except a licensed wholesaler. The evidence disclosed that the licenses were granted or withheld on the basis of the wholesaler's "business ethics," which included his adherence to resale prices suggested by the refiner. Initially, the Court pointed out that "if appellant's comprehensive control of the market in the distribution of lead-treated gasoline, as disclosed by the record, had been acquired without aid of the patents, but wholly by the contracts with refiners and jobbers, such control would involve a violation of the Sherman Act," 309 U.S. 436, 455. The Court then turned to the defense based on the patents and, in language applicable as well to White's competitive restraints on its distributors and dealers, stated at 309 U.S. 436, 457–458:

> * * * [A]ppellant has established the marketing of the patented fuel in vast amounts on a nationwide scale through the 11,000 jobbers

> and at the same time, by the leverage of its licensing contracts resting on the fulcrum of its patents, it has built up a combination capable of use, and actually used, as a means of controlling jobbers' prices and suppressing competition among them * * *. Such contracts or combinations which are used to obstruct the free and natural flow in the channels of interstate commerce of trade even in a patented article, after it is sold by the patentee or his licensee, are a violation of the Sherman Act. * * *

Thus, not even a patent or other statutory monopoly is sufficient justification for a manufacturer's restricting the price at which or the persons to whom his vendees may sell the manufactured article. In the absence of a statutory monopoly the illegality of such restrictions is incontestable. Nothing is now before the Court but the naked assertion that White, having sold its new trucks and parts to independent businessmen, nevertheless retains power to eliminate competition in their resale. A similar contention was answered in *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 721, in these few words:

> Soft-Lite is the distributor of an unpatented article. It sells to its wholesalers at prices satisfactory to itself. Beyond that point it may not project its power over the prices of its wholesale customers by agreement. * * * *The same thing is true as to restriction of customers.* * * * [Emphasis added.]

In sum, White's territorial restrictions are outside the exceptions to the common law prohibition of restraints of trade and unlawful under the Sherman Act both (1) because the common law recognized no excep-

tion for restraints intended to eliminate competition among purchasers of a manufacturer's goods and (2) because they do not involve the sale of property "with which the buyer might set up a rival business."

II. APPELLANT'S CONTRACTS ELIMINATING COMPETITION IN THE SALE OF WHITE AND AUTOCAR TRUCKS BY FORBIDDING DISTRIBUTORS TO SELL TO CERTAIN CLASSES OF CUSTOMERS ARE PER SE UNLAWFUL CONTRACTS IN RESTRAINT OF TRADE

Considerations almost identical to those invalidating the territorial restrictions establish the unlawfulness, *per se*, of White's other attempts to eliminate competition in trucks it has sold to distributors and dealers. We deal with these in summary fashion, referring the Court, for a fuller discussion, to Part I of this brief.

A. WHITE'S CONTRACTS FORBIDDING ITS INDEPENDENT DISTRIBUTORS AND DEALERS FROM SELLING TO CERTAIN NAMED ACCOUNTS, WHICH WERE RESERVED TO WHITE ITSELF, ARE ILLEGAL PER SE

In its contracts with its distributors and dealers White reserved certain customers for itself, and the distributors and dealers agreed not to sell to those customers. A typical clause from a contract with a distributor states (R. 425):

> Distributor further agrees not to sell nor to authorize his dealers to sell such trucks to any Federal or State government or any department or political subdivision thereof, unless the right to do so is specifically granted by Company in writing.

Such agreements are illegal *per se* under the long-established rule prohibiting agreements among com-

petitors allocating customers and restraining competition for their patronage.

In *United States* v. *McKesson & Robbins*, 351 U.S. 305, this Court held that resale-price-maintenance agreements between a drug manufacturer (that sold both to independent wholesalers and to retailers) and the independent wholesalers (that sold to retailers) were illegal *per se* under the established law forbidding price-fixing agreements among competitors. The Miller-Tydings and McGuire Acts exempt from the Sherman Act resale price maintenance contracts authorized by State law, but the exemption does not apply to contracts "between persons, firms, or corporations in competition with each other." It was upon the latter ground that the Miller-Tydings and McGuire Act exemption was held inapplicable to McKesson & Robbins. Thus, the decision squarely holds that, where a manufacturer undertakes to sell its product both directly and through distributors or dealers, the manufacturer and its distributors or dealers are competitors on the same functional level, subject to all the Sherman Act prohibitions against agreements among competitors intended to restrain competition. The agreements between White and each distributor or dealer under which the latter agreed not to resell trucks it had purchased from White to certain named accounts which White had reserved for itself are, therefore, subject to the long-established, *per se* prohibition against agreements among competitors allocating customers and eliminating competition for their patronage.

Even if White's double role as manufacturer and distributor were considered to distinguish its agreements from horizontal divisions of customers or markets, these agreements would be illegal *per se* under the principles discussed above with respect to vertical divisions of markets. The agreements eliminate all competition among the parties for named customers and deprive these customers of the benefits of competitive terms in the purchase of White trucks. White's sole attempt to justify this eliminination of competition—"the only sure way to make certain that something really important is done right, is to do it for oneself" (Appellant's Brief, p. 18)—is in flat disregard of a basic premise of the Sherman Act: that it is the customer who should decide whether he prefers a lower price or the benefits of certainty that the product and services purchased will be of high quality. White has available the familiar and legitimate alternative of convincing the largest purchasers of its trucks that its services are superior to those of its distributors. White's agreements, which are not ancillary to the sale of a significant portion of its business or of its manufacturing assets, would be illegal at common law as well as under the Sherman Act.

B. WHITE'S CONTRACTS FORBIDDING ITS INDEPENDENT DISTRIBUTORS AND DEALERS FROM SELLING TO ANY PERSON FOR RESALE WITHOUT WHITE'S CONSENT ARE ILLEGAL PER SE

In *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, this Court held that the Sherman Act prohibits a manufacturer from requiring its distributors to agree not to sell to any customer for resale without

the consent of the manufacturer. This issue is, therefore, no longer open.

We have reviewed the facts and decision in *Bausch & Lomb* at some length above, *supra*, pp. 36–38. Here it is sufficient to emphasize that in the district court Judge Rifkind had held that Soft-Lite had violated the Sherman Act "by entering into agreements with wholesale customers which provide that the said wholesalers will sell Soft-Lite lenses and blanks only to retailers who are designated as 'licensees' by the defendant Soft-Lite Lens Company, Inc." See 321 U.S. at 717. This Court affirmed, treating the separate elements of resale price maintenance and restriction of wholesalers' customers as equally violative of the Sherman Act and stating (321 U.S. 721):

> Soft-Lite is the distributor of an unpatented article. It sells to wholesalers at prices satisfactory to itself. Beyond that point it may not project its power over the prices of its wholesale customers by agreement. A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchasers may resell * * *. The same thing is true as to restriction of customers.[25]

There can be no doubt that the Court considered and decided the question of the validity of a manufac-

---

[25] Similarly, the Court stated (321 U.S. 723) that: "So far as the wholesalers are concerned, Soft-Lite and its officers conspired and combined among themselves and with at least some of the wholesalers to restrain commerce by designating selected wholesalers as sub-distributors of Soft-Lite products, by fixing resale prices and by limiting the customers of the wholesalers to those recommended by the wholesalers and approved by Soft-Lite—all in violation of the Sherman Act."

turer's requirement of its prior approval of any customer buying its product from an independent distributor for purposes of resale. The Court's decision that such agreements are unlawful under the Sherman Act conclusively disposes of White's contention that its indistinguishable agreements are lawful.

Even if the issue were an open one, it would be clear that agreements requiring the manufacturer's approval of any sale for resale are illegal *per se*. The anticompetitive effects of such agreements are twofold. First, like an agreement to boycott, it restricts by contract the freedom of independent distributors to determine whether to deal with a particular customer, subjecting that customer to the combined economic force of a group controlled by the manufacturer. Second, it deprives the ultimate consumer of the opportunity to deal with any retailer whose methods of selling and competing are disapproved by the manufacturer.

These anticompetitive effects could not be justified in the case of an agreement among the distributors, although their interest in the good reputation of White trucks is as great as is White's; the reasonableness of an agreement not to sell to a particular class of customers is no more open a question when presented by White. Moreover, White's attempt to justify these restrictions as necessary for the preservation of the reputation and good will of its product is no different from that rejected in the *Dr. Miles* case. The answer is the same here: it is for the ultimate consumer and not for White Motor to decide whether a price-cutting retailer or one providing

higher-quality sales and services is preferable. Finally, White's purpose of protecting its product's reputation from injuries done to it by unauthorized, inferior dealers can be substantially effectuated by such legitimate means as informing the public of the advantages of dealing with the distributors or retailers it chooses and officially recommends.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LEE LOEVINGER,
Assistant Attorney General.
ROBERT B. HUMMEL,
MICHAEL I. MILLER,
Attorneys.

DECEMBER 1962.

U.S. GOVERNMENT PRINTING OFFICE 1962